

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS**

In re : Chapter 7
MELVIN KATZ, : CASE NO. 01-11068-JBR
DEBTOR :

**MEMORANDUM OF DECISION ON TRUSTEE'S MOTION FOR ORDER
AUTHORIZING AND APPROVING PRIVATE SALE OF PROPERTY OF THE
ESTATE**

This matter came before the Court on the Trustee's Motion For Order Authorizing and Approving Private Sale of Property of the Estate [#38], whereby the Trustee seeks to sell the estate's approximately 4.47% interest in the LeMar Crossing Limited Partnership (the "Partnership"). The estate appears to hold its interest as a tenant-in-common with Marlene Markarian. The other partners, Mark Aronson and Sarah Hovsepien are the intended purchasers. Markarian has objected to the sale on the grounds that the Trustee has not complied with the terms of their 2003 Stipulation and that a sale of the partnership's assets would yield a greater dividend.

FACTS

The facts in this case are set forth in the Court's Memorandum of Decision on Defendant's Motion to Dismiss Counts I through VII of the Amended Complaint for Lack of Subject Matter Jurisdiction [Adv. Pro. 05-4124, doc #42],¹ *Nickless v. Aaronson (In re Katz)*, 341 B.R. 123 (Bankr. D. Mass. 2006), but are briefly summarized as follows. In

¹There is one correction to the facts as previously reported. As part of a settlement between the Chapter 7 Trustee and Markarian, she released her claim only to the interest in the Partnership which the Debtor had transferred to her prepetition. Markarian owns an approximately 5.53% interest in the Partnership.

1988 the Debtor, Markarian, Aaronson, and Mr. and Mrs. Hovsepan² formed the Partnership to own, develop, lease and operate property, including real property. At the same time the LeMar Crossing Trust (the “LeMar Trust”), was established to hold certain property for the sole benefit of the Partnership. Currently the LeMar Trust’s res consists of real estate located at 246 Boston Turnpike, Shrewsbury, Massachusetts, a commercial mixed-use property (the “Property”). According to Objection, Markarian believes the Property has a value in excess of \$2.5 million. The Chapter 7 Trustee believes the Property’s value is approximately \$1.5 million to \$1.9 million.

Originally the Debtor and Markarian collectively owned a one-third interest in the Partnership as tenants in common. At some point that is unclear and irrelevant to this decision, their interest in the Partnership was reduced to approximately 10% as a result of offsets to their capital account. On February 27, 2001 the Debtor filed a voluntary petition pursuant to Chapter 7 of the United States Bankruptcy Code and shortly thereafter the Chapter 7 Trustee was appointed. Prior to filing bankruptcy, the Debtor purportedly transferred his interest to Markarian for \$92,045.00.

The Chapter 7 Trustee commenced an adversary proceeding against Markarian [Adv. Pro. 02-4342] to avoid the transfer. Subsequently the Chapter 7 Trustee and Markarian entered into a settlement agreement which was approved by the Court. That agreement provides in relevant part:

1. The Trustee will take those actions necessary to sell the Partnership assets, cause a liquidation of the Partnership, and a distribution of the proceeds to the partners in

²Mr. Hovsepan is deceased and his wife now has sole ownership of their partnership interest.

accordance with their respective shares.

2. Markarian will release to the Trustee her claims to a 4.47% interest in the Partnership.

3. The bankruptcy estate shall bear all direct costs to obtain liquidation of the partnership interest.

4. The parties shall jointly bear in accordance with the respective partnership interests the costs of any third party charged with the responsibility of conducting a sale of the partnership assets or liquidating the partnership.

In 2005 the Chapter 7 Trustee filed Adversary Proceeding 05-4124 against Aaronson and Hovsepian and sought, among other things, permission to sell the Partnership's assets. As explained in the Memorandum of Decision, the Court dismissed those counts seeking authority to sell the Partnership's assets because "[i]t is axiomatic that the mere bankruptcy of a partner does not bring the partnership's assets within the jurisdiction of the bankruptcy court. A debtor's interest in a partnership is an asset of the debtor's estate under 11 U.S.C § 541; the assets of the partnership are not." *Id.* at 128. Moreover the Court abstained from hearing the remaining counts, noting

The crux of the amended complaint involves the Chapter 7 trustee's attempts to reach and sell the Partnership's assets, a result he cannot achieve directly in the Debtor's bankruptcy. Seeking to accomplish indirectly what he cannot do directly, the Chapter 7 Trustee seeks a court-ordered wind up of the Partnership and the appointment of a receiver to wind up and account for the Partnership assets. These kinds of actions are better suited for state court.

Failing to obtain this Court's permission to sell the Partnership assets, the Chapter 7 Trustee reached an agreement to sell the estate's interest in the Partnership to Aaronson and Hovsepian for \$44,700.00. Markarian's is the only objection; there

were no counteroffers.

Discussion

A settlement agreement is contract which must be enforced according to its terms if it is not ambiguous. *Malek v. Verizon Communications, Inc.*, 2004 WL 180251, *3 (D.Mass.). Whether a contract is ambiguous depends upon when its language is "reasonably prone to different interpretations" or "susceptible to differing, but nonetheless plausible, constructions." *Alison H. v. Byard*, 163 F.3d 2, 6 (1st Cir.1998). Whether a term is ambiguous is a question of law. *Id.*

The settlement agreement between the Chapter 7 Trustee and Markarian is not ambiguous. To the contrary, the agreement is clear that the Chapter 7 Trustee obligated himself to take the actions necessary to obtain a liquidation of the Partnership and a sale of its assets. The Chapter 7 Trustee does not argue that he cannot accomplish these results. Instead he argues that his filing of the unsuccessful adversary proceeding against Aaronson and Hovsepian in this Court satisfied his obligation. It does not. The settlement agreement does not limit the Chapter 7 Trustee's obligations to seeking relief from only this Court; it does not even require that he make an effort or a reasonable effort or use his best efforts. It requires that he "take those actions necessary...." That the Chapter 7 Trustee believes that a state court action for wind up of the Partnership will take time and he cannot be assured of its success does not relieve him of the obligation he undertook in the settlement agreement.

Because the settlement agreement obligated the Chapter 7 Trustee to seek a sale of the Partnership's assets, it is not relevant that the Chapter 7 Trustee believes

that a sale of the Debtor's interest in the Partnership is in the estate's best interest and that the amount the purchasers have offered for the interest is reasonable. He cannot undertake to sell only the estate's interest in the Partnership in breach of his obligations under the settlement agreement.

For the foregoing reasons, the Trustee's Motion For Order Authorizing and Approving Private Sale of Property of the Estate [#38] will be DENIED.

A separate order will issue.

Dated: August 11, 2006

A handwritten signature in black ink, reading "Joel B. Rosenthal". The signature is written in a cursive, flowing style. Below the signature is a horizontal dashed line.

Joel B. Rosenthal
United States Bankruptcy Judge